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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE METROPOLITAN COUNCIL
HOUSING AND REDEVELOPMENT AUTHORITY

In the Matter of Edward and Tracy Berner	FINDINGS OF FACT, CONCLUSIONS AND ORDER
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This matter came on for hearing on November 17, 2009, at the Metropolitan Council Housing and Redevelopment Authority (Metro HRA), 390 North Robert Street, St. Paul, Minnesota. The OAH record closed at the conclusion of the hearing that day.

Mary G. Dobbins, Landrum Dobbins LLC, appeared on behalf of the Metro HRA. Edward and Tracy Berner (Respondents) appeared without counsel.

STATEMENT OF THE ISSUES

1. Did the Respondents wrongfully obtain Housing Assistance Payments under the Section 8 Housing Choice Voucher Program in the amount of \$4,284?

2. Is the Metro HRA entitled to recover the wrongfully obtained funds using the Revenue Recapture Act, Minnesota Statutes Chapter 270A?¹

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Metro HRA is the public housing authority that administers the Section 8 Housing Choice Voucher Program in the metropolitan Twin Cities area on behalf of the U.S. Department of Housing and Urban Development.

2. Edward and Tracy Berner live in Buffalo, Minnesota. Edward Berner has a full-time job and also operates a property management business called Today's Property Investments, LLC. The Berners personally own the six rental properties that are managed by Today's Property Investments. The properties are located in Brooklyn Park, Robbinsdale, St. Paul, and Buffalo.

¹ All citations to Minnesota Statutes are to the 2008 edition.

Edward Berner handles most of the communications with tenants and does the company's books. Tracy Berner assists him as needed and schedules any repairs for the rental properties.²

3. Three of the rental properties owned by the Respondents are leased to tenants who receive Section 8 housing assistance.³

4. The Respondents' rental property in Robbinsdale is a side-by-side duplex located at 5623 - 42nd Avenue North. Both units have three bedrooms, with a family room that can be used as a fourth bedroom if desired. The Respondents purchased the property in 2004.⁴

5. In October 2006, the Respondents rented one of the units at 5623 - 42nd Avenue North to Allen Morris and two other roommates. In February or March 2008, the two roommates moved out. At that time the rent for the unit was \$1,250 per month plus utilities.⁵

6. Allen Morris encouraged his girlfriend, Tina Linton, to move into the duplex with her two children to help with the rent expense.⁶ Tina Linton had a voucher qualifying her for Section 8 housing assistance for a two-bedroom unit.⁷

7. In June 2008, Mr. Berner completed a Request for Tenancy Approval for the property at 5623 - 42nd Avenue North. He indicated the unit had three bedrooms and the rent would be the "maximum allowed" under Section 8.⁸ Based on the location, quality, size, unit type, and age of the unit, the Metro HRA advised Mr. Berner on June 13, 2008, that the maximum rent for the property would be \$754.00 per month.⁹ Mr. Berner agreed that this amount was acceptable.¹⁰ His expectation, which was not shared with the housing worker, was that Mr. Morris, the other tenant, would pay the difference between the amount authorized by the Metro HRA and the rent of \$1,300 per month that he intended to charge for the unit.¹¹

8. On June 26, 2008, Mr. Berner signed a Housing Assistance Payments (HAP) Contract for the unit at 5623 - 42nd Avenue North. The HAP Contract identifies the tenant as Tina Linton. It also identifies other household members as Linton's two minor children, and it provides that only these household members may reside in the unit and that "[o]ther persons may not be added to the household without prior written approval of the owner and the

² Testimony of Tracy Berner.

³ Testimony of Edward Berner.

⁴ *Id.*

⁵ *Id.*

⁶ Ex. 14; Ex. 9.

⁷ Ex. 4.

⁸ Ex. 3.

⁹ Testimony of Melissa Montbriand.

¹⁰ Ex. 3.

¹¹ Testimony of Edward Berner.

[Public Housing Agency].” The rent was identified as \$754.00, of which the Metro HRA would pay \$714.00 directly to Mr. Berner. Ms. Linton was to pay the remaining \$40 herself.¹²

9. The HAP Contract also provides, in relevant part, as follows:

During the HAP Contract term, the rent to owner may at no time exceed the reasonable rent for the contract unit as most recently determined or redetermined by the [Public Housing Agency] in accordance with HUD requirements.¹³

During the term of this contract, the owner certifies that: . . . [e]xcept for the rent to owner, the owner has not received and will not receive any payments or other consideration (from the family, the [Public Housing Agency], HUD, or any other public or private source) for rental of the contract unit during the HAP contract term.¹⁴

The composition of the household must be approved by the [Public Housing Agency]. The family must promptly inform the PHA of the birth, adoption or court-awarded custody of a child. Other persons may not be added to the household without prior written approval of the owner and the [Public Housing Agency].¹⁵

The initial rent to the owner may not exceed the amount approved by the [Public Housing Agency] in accordance with HUD requirements.¹⁶

The owner may not charge or accept, from the family or from any other source, any payment for rent of the unit in addition to the rent to owner. Rent to owner includes all housing services, maintenance, utilities and appliances to be provided and paid by the owner in accordance with the lease.¹⁷

10. On June 29, 2008, Mr. Berner and Ms. Linton executed a lease for the property indicating that she was the only tenant and that the monthly rent was \$754.00 plus utilities. The term of the lease was from July 1, 2008, through June 30, 2009.¹⁸ A copy of this lease was provided to the Metro HRA.

11. On July 1, 2008, Mr. Berner executed another lease for the same property with Allen Morris and Tracy Linton. This lease indicates that both Mr.

¹² Ex. 6 at 1 of 10.

¹³ Ex. 6, Part B ¶ 6(a), page 4 of 10.

¹⁴ *Id.*, Part B ¶ 8(d), page 5 of 10.

¹⁵ *Id.*, Part C ¶ 3(b), page 7 of 10.

¹⁶ *Id.*, Part C ¶ 4(a).

¹⁷ *Id.*, Part C ¶ 5(e).

¹⁸ Ex. 5.

Morris and Ms. Linton were tenants and that the monthly rent was \$1,300.00 plus utilities.¹⁹ The term of the lease was from July 1, 2008, through June 30, 2009. This lease agreement was not provided to the Metro HRA.²⁰

12. On June 3, 2009, the Metro HRA notified Mr. Berner that it had re-evaluated Ms. Linton's income and that effective July 1, 2009, the Metro HRA would pay \$676.00 per month and Ms. Linton would be responsible for paying \$78.00 per month, but the total rent would stay the same.²¹

13. On July 14, 2009, Tracy Berner telephoned Pat Wolfe, the administrator of the Section 8 program for the HRA in the cities of Fridley, Spring Lake Park, St. Anthony, and Robbinsdale. Ms. Berner sought assistance from Ms. Wolfe in removing Ms. Linton from the unit because Ms. Linton was causing problems with Allen Morris, the other tenant who had lived there for the past three years. Ms. Wolfe checked the lease for the property and learned that Ms. Linton was the only authorized tenant. Ms. Wolfe made further inquiries of Ms. Berner about the rent paid by Mr. Morris, at which point Ms. Berner wanted to know why Wolfe was asking so many questions about him. Ms. Berner said that Morris paid \$600 per month, but referred all other questions about his tenancy to her husband, who she said was not available to speak with Ms. Wolfe at that time.²²

14. Ms. Wolfe contacted the Robbinsdale Police Department and obtained copies of two incident reports concerning the unit at 5623 - 42nd Avenue North. In one report, Ms. Linton and Mr. Morris are identified as roommates at this address. They had jointly reported property damage and terroristic threats made by a third person. In the other report, Mr. Morris identified Ms. Linton as his live-in girlfriend.²³

15. Between July 1, 2008, and July 30, 2009, the Metro HRA paid the Berners \$8,568 in housing assistance payments for Ms. Linton.²⁴ The Metro HRA determined that the Berners and Ms. Linton knowingly and jointly deceived the agency about the household membership and total rent paid for the unit. It determined that it would attempt to recover half of these overpayments from the Berners and half from Ms. Linton.²⁵

16. On August 27, 2009, the Metro HRA advised the Berners that they had breached the HAP Contract and that, as a consequence, they were not entitled to receive any housing assistance payments under the agreement. The letter further notified the Berners that they were obligated to pay back \$4,284

¹⁹ Ex. 11.

²⁰ Testimony of Pat Wolfe.

²¹ Ex. 13.

²² Testimony of Pat Wolfe; Ex. 1..

²³ Exs. 7 & 8.

²⁴ Ex.10.

²⁵ Testimony of Tamara Witt.

within ten days, and if they failed to do so, the Metro HRA would seek to recover that amount through the Revenue Recapture Act. In addition, the letter advised the Berners that due to their deliberate malfeasance, they would no longer be permitted to receive HAP payments for any other tenants and were no longer eligible to participate in the Section 8 program. Finally, the letter advised the Berners of their right to a hearing.²⁶

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has the authority to consider the charges against the Respondent pursuant to Minn. Stat. §§ 14.50, 270A.08, and 270A.09 (2008).

2. The Metro HRA has complied with all relevant procedural requirements and has given proper notice of the hearing.

3. An owner who violates any obligation under the HAP contract for the dwelling unit breaches the HAP Contract.²⁷

4. The Respondents breached the HAP Contract by renting the same dwelling unit simultaneously to both an eligible person and to a person not identified as a household member in the HAP Contract.

5. The Respondents breached the HAP Contract by collecting more rent for the dwelling unit than the amount authorized in the HAP Contract.

6. The Metro HRA has rights and remedies against the Respondents under the HAP contract for recovery of overpayments and termination of the contract.²⁸

7. Under the HAP contract, the owner has no right to receive housing assistance payments unless the owner has complied with all provisions of the contract.²⁹ If a public agency determines that the owner is not entitled to housing assistance payments, the agency, in addition to other remedies, may deduct the amount of overpayment from any amounts due the owner.³⁰

8. The Respondents owe the Metro HRA \$4,284.00 for overpayment received as a consequence of their breach of contract.

²⁶ Ex. 10.

²⁷ 24 C.F.R. § 982.453(a).

²⁸ 24 C.F.R. § 982.453 (b).

²⁹ Ex. 6, Part B ¶ 7(b).

³⁰ *Id.*, ¶ 7(f).

9. The Metro HRA is a public agency established by law that is responsible for the administration of a low-income housing program. It is a "claimant agency" as defined in the Revenue Recapture Act.³¹

10. A "debt" as defined in the Revenue Recapture Act means a legal obligation of a natural person to pay a fixed and certain amount of money that exceeds \$25 and which is due and payable to a claimant agency. A debt may arise under a contractual or statutory obligation, a court order, or other legal obligation, but need not have been reduced to judgment.³²

11. The amount of overpayment made to the Respondents is "debt" under the Revenue Recapture Act.

12. The Metro HRA gave Respondents notice of its intent to use the Revenue Recapture Process to collect the debt, as required by Minn. Stat. § 270A.08, subd. 2.

13. The Metro HRA is entitled to use the Revenue Recapture Act to offset the debt against any tax refund owed to the Respondents.

Based upon these Conclusions, the Administrative Law Judge makes the following:

ORDER

The Respondents owe the Metro HRA the sum of \$4,284.00. The Agency may recover the amount owed pursuant to Minnesota Statutes Chapter 270A or as otherwise authorized by law.

Dated: December 11, 2009

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Digitally Recorded: No transcript prepared

NOTICE

This report constitutes the final decision and order in this matter, subject to the provisions for judicial review under Minnesota Statutes Sections 14.63 to 14.68.

³¹ See Minn. Stat. § 270A.03, subd. 2.

³² See Minn. Stat. § 270A.03, subd. 5(a).

MEMORANDUM

The Respondents argue that they relied on Ms. Linton to ensure that the arrangement was approved by her Section 8 worker, and they fault the Metro HRA for failing to educate landlords about the requirements of the program. Mr. Berner and the Metro HRA are the parties to the HAP Contract. The HAP Contract is a standard agreement developed by HUD to be used with each dwelling unit leased to a tenant receiving housing assistance. It contains numerous provisions making it clear that the living arrangement proposed by Mr. Morris and Ms. Linton was impermissible.

Although Mr. Berner maintains he received only the first two pages of the HAP Contract and did not receive the standard attachments, Mrs. Berner testified that they had copies of the standard attachments in HAP Contracts executed for other dwelling units. Moreover, the first two pages contain the fundamental terms describing the identity of the tenant, the composition of the household, the prohibition on adding persons to the household without prior written approval of the owner and agency, the monthly rent, and the prohibition on raising the rent. The Administrative Law Judge finds the argument that Mr. Berner was not aware of his obligations under the HAP Contract to be unconvincing.

It seems fairly clear that Mrs. Berner was not aware of the program requirements until recently, or she would not have contacted Ms. Wolfe and volunteered the information that there were multiple tenants in the unit. Mrs. Berner is a joint owner of the property, however, and both she and her husband received the assistance payments. On this basis, the Metro HRA is also entitled to recoup the overpayments from Ms. Berner's share of any tax refund.

K.D.S.